No. 14770

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC., a Corporation, PETER A. BANCROFT and VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,

Appellees,

and

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C. FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

BRIEF OF APPELLEES VINELAND SCHOOL DISTRICT AND PETER BANCROFT.

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Opinion Below.

The opinion below may be found in 127 Fed. Supp. 158 and R. 125-142.

Jurisdiction.

The jurisdiction of the District Court rested on 28 U. S. C., Section 1345. A judgment was entered by the District Court on February 8, 1955. [R. 125-142.] Notice of appeal was filed by Appellant herein April 13, 1955. [R. 180.] The jurisdiction of this Court rests on 28 U. S. C. 1297.

Statement.

The statement presented by this Appellee in its Appellant's Brief (Appellant Vineland's Op. Br.) was an endeavor to set before the Court a concise statement of the relevant facts necessary to a determination of this action without quoting portions of documents, exhibits or law therein which would color those facts in favor of any party. The fact statement as presented in "Appellant Vineland's Opening Brief," pages 3-7, is hereby incorporated in this brief as if fully set forth herein.

The remainder of this statement will be used in clarification of the facts indicated by the Government in its "Statement." (Brief for the United States, pp. 3-13.)

The Government in its statement in the middle of page 3 of its brief quotes portions of Vineland's Exhibit "E," instructional circular, but neglects to quote a portion of said exhibit in connection with the disposal of aircraft to schools, which states as follows: "Distribution under this plan will be confined to aeronautical property which has been determined by the disposal agency to be commercially unsalable by reason of its condition resulting from damage, wear, obsolescence, or otherwise, has no reasonable prospect of sale except as scrap, or with respect to which by reason of its large supply or prior use the estimated cost of care, handling and disposal will exceed the estimated proceeds unless it is promptly sold as scrap, or with respect to which the estimated cost of care, handling and disposal will exceed the estimated

proceeds as scrap, or otherwise." It is to be noted that the aircraft in suit is listed on said exhibit.

WAA Form 65 as executed speaks for itself in its entirety as to what it contains concerning both the Government and the school district. This Appellee will not attempt in this statement to answer the Government's statement by pointing out portions of said agreement which the Government has failed to quote in its summary of contents. (Govt. Br. pp. 3-4.)

The Government's statement (Br. p. 4), indicates a market value of the subject aircraft at the time of transfer to Vineland of Five Thousand Dollars ($5,000). The attention of the Court is drawn to the determination of the Government at the time of the sale that the subject aircraft was "commercially unsalable". [Vineland's Ex. E; R. 509.] Also the Five Thousand Dollar ($5,000) value was the purported value of the aircraft in 1947 and 1948, not 1946, as indicated by the Government's reference to the record in this connection. [R. 281, 300.] It is also to be noted that said Five Thousand Dollars ($5,000) value is an aircraft without restrictions upon it. The subject aircraft with whatever restrictions were reputed to be on such aircraft in 1946 was only of the value of its metal. [R. 299, 418-419, 413-414.] Even without restrictions it had no value. [R. 895.]

The Government in its statement on page 5 at the end of the top paragraph therein states: "No other document in the nature of a bill of sale or a certificate of title was ever issued to Vineland." The Court's atten-

tion is called to "Sales Receipt," International's Exhibit A(1) and the argument presented herein (*infra,* IV, pp. 44-53) as to whether or not said "Sales Receipt" and other documents were in the nature of a "bill of sale." [R. 375.]

The Government in its statement (Br. pp. 5-8), (see also "Argument" Brief for United States, p. 54), repeatedly draws to the Court's attention the fact that Vineland recognized restrictions with respect to the subject aircraft and did so in its agreement with Defendants Finn [Vineland's Ex. B; R. 59] and Notice for Bids. [Vineland's Ex. A; R. 57.] Not only are the implications contained thereon unfounded in the evidence but clearly are not appropriate innuendo to place in a brief before this Court. The district is to be commended for placing in any agreement or notice for bids for the sale of the subject aircraft the necessity for the consent of the Government for removal of any restrictions which may or may not exist, this action by the district obviously occurring out of a spirit of cooperation toward the Federal Government, a overzealous desire to do any and all things proper under the circumstances, and an abundance of caution.

ARGUMENT.

I.

Restrictions Against Flight Use and Resale of the Subject Aircraft Contained in the Executed WAA Form 65 Are Invalid. The Appropriate Regulation and Statutes Must Be Read Into the Agreement.

A vital part of the decision of the lower court concerns these two basic propositions: first, the validity of restrictions in the executed WAA Form 65 Agreement [R. 15-16] when compared to Regulation 4, Section 8304.11 (b)(2)(3), of the War Assets Administration (32 C. F. R. 1946 Supp.); second, whether or not the subject restrictions in Regulation 4 are valid when compared to the Surplus Act of 1944 (58 Stat. 765).

A. The provisions of the Form 65 Agreement concerning restrictions on flight uses and resale of the subject aircraft were invalid when compared to the appropriate Regulation 4 in that said restrictions, as they appeared in Form 65, were "clearly inconsistent and erroneous."

1. The District Court pointed out in its decision [R. 132-134] that the appropriate Regulation 4 (C. F. R. 1946 Supp., Sec. 8304.11(b)) restricted the disposal agency, in its procedures, in disposing of surplus aeronautical property to a public institution. The Court clearly indicates such procedures were mandatory on the disposal agency in that the Regulation provided they *shall* include "(2) a certification . . . of the purposes for which the

property is to be acquired, and, in the case of aircraft, an agreement that it will not be flown except for purposes of research or experiment in connection with the science of aeronautics, and (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap." The executed WAA Form 65 Agreement, on the other hand, prohibited entirely any and all flight use, including flight for research and experimental purposes, and also said Form 65, as executed, indicated that the restrictions were to be enforceable for all time and would not lapse in three (3) years as demanded by the appropriate Regulation. These discrepancies were not only in violation of Regulation, but also the Surplus Property Act itself. (*Infra,* par. I, B, pp. 12-25.) It must be presumed the regulatory body, in adopting appropriate Regulation 4, knew this, thus these provisions were inserted not as mere minimums, but mandatory maximums. (*Infra,* I, A, 5, (2) (a), pp. 10-12.)

2. As pointed out by the Court, and herein, the language of the Regulation is mandatory, and thus the Regulation must control the subject WAA Form 65 Agreement to the extent authorized by the statute. *United States ex rel. Accardi v. Shaughnessy,* 347 U. S. 260 (1954); [R. 134].

3. When the background of former agreements and regulations, out of which the WAA Form 65 Agreement was drafted by the disposal agency, is considered, it can be seen that the inconsistency be-

tween said Agreement and the Regulation occurred out of oversight or error on the part of the Government.

a. The executed WAA Form 65 Agreement was based upon an earlier form of agreement, No. 35 [Finns Ex. "B"], which was used by the Reconstruction Finance Corporation for the disposal of aircraft for educational purposes. The Regulation in force at the time of the adoption of the Form 35 Agreement was Regulation 4, 10 F. R. 5460, which contained more strict restrictions on flight use and resale in Section 8304.4:

" '(c) the Buyer shall file with the Disposal Agency a certificate under oath, duly notarized that such buyer is an educational institution, as defined in Section 8304.1(e), that the property is being acquired to be used only for non-flight instructional, research or experimental purposes; that it will not be used for any flight purposes, and that the property will be disposed of only for scrap and only after it shall have been rendered completely unfit and useless except for its basic material content.' The Form 35 Agreement adopted the exact language of said Regulation. It may be seen in inspection and the testimony in this case that the language of the old Regulation and the old Form 35 Agreement [Finn Ex. B] was carried over into the WAA Form 65 Agreement, either intentionally, or in all probability inadvertently or in error. [R. 379-382.]

Thus, the executed Form 65 Agreement provides:

"That all acquired property, when unfit for the above purpose, will be sold only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material con-

tent. Sales consummated within three years of the date of acquisition must have the prior approval of the Disposal Agency."

b. To allow a disposal agency to carry over provisions of an old regulation which has been amended out by a new regulation, would be allowing a disposal agency to act beyond its statutory powers. A disposal agency cannot continue an old regulation in effect after said regulation has been amended or otherwise changed by the regulatory body, unless clearly and expressly authorized to do so by said regulatory body. The Government argues in its brief that the disposal agency is given broad discretion which is, of course, true, but if such be the case here, there would have been no reason for the change in the regulation having ever been made. It is conceivable that the regulatory body, in changing Regulation 4, in 1945 and 1946, making it more liberal (providing for flight use and resale after three years) did so on advice of counsel or their own determination that to provide otherwise was contrary to the objectives of the Surplus Property Act of 1944 (*infra,* I, B, pp. 12-25). Therefore, this is not a mere situation of a disposal agency entering into an agreement which is more to the advantage of the Federal Government, as has been argued by the Government (Govt. Br. pp. 35-36) in this action, but is a situation where a disposal agency has clearly violated a mandatory regulation and through inadvertence, or intentionally, has carried the provisions of an old regulation to a new form agreement, while purporting to comply with the new regulation.

4. The instant case also is not a mere situation where an interpretation of the administrative agency concerning an "ambiguity" must be accepted, as the Government argues in its brief (p. 40) but is such an error and inconsistency that it will be difficult to match in the future eras of Administrative confusion.

5. It would have been sufficient for the District Court to stop at this point in its decision and find that the resale of the subject aircraft by Vineland to the Finns was in accordance with the Regulation, inasmuch as said resale occurred after a holding of said aircraft by the Vineland School District for a period of four years and the regulation clearly indicates only three years was necessary. The District Court, however, did not stop at this point and went on to point out the violations by the regulatory body of the objectives of Congress set forth in the Surplus Property Act of 1944, when said regulatory body placed the subject restrictions in its Regulation. [R. 135-136.] These violations are so clear, the District Court could hardly ignore them. Before taking up the Court's decision concerning the restrictions in the Regulation and their invalidity when compared to the objectives of the Surplus Property Act, this Appellee shall, in the next few paragraphs, concern itself with the subject three year provision of the Regulation. The District Court in considering the three year provision concludes in its decision [R. 136] as follows:

"The three-year restriction on unfettered disposal having expired at the time of the sale to defendants Finn, the School District was free to sell the aircraft as such without violating the provisions of subsection

(3) of the regulation. (See United States v. School District, *et al.,* No. 1107 (E. D. Mich. 1954).)"

a. Regulation 4, Section 8304.11(b), as amended May 21, 1946, makes it *mandatory* upon the disposal agency to adopt an agreement which includes the material set forth in subdivision (3) thereof. Said subdivision (3) provides: "(3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap." The regulatory body clearly indicates an intention that after the three year period from the date of purchase, the property may be sold by the education institution for *any purpose* without the necessity of the consent of the disposal agency, and within the three year period the property may be sold if mutilated by said agency or otherwise rendered unfit for use, except as scrap.

(1) If said Regulation, subdivision (3), were to be interpreted as it appears in the WAA Form 65 Agreement, and as the Government would have us to believe it should be interpreted in this action, there would have been no reason for the regulatory body to place the 3 year period in said section (see *supra, re* inconsistency).

(2) A time limitation on the subject restrictions was also necessary to the very validity of the regulation when compared to the statute, and consequently, to the validity of such clauses in an agreement.

(a) For the purposes of this argument we will set aside for the moment the District Court's finding

that any restrictions on flight use and resale in the regulation were invalid and accept (without conceding) the Government's argument that some limitation on educational use was necessary to guarantee the Government its fair value in "benefits" by a reasonable period of educational use.

Since it must be presumed that the regulatory body, in adopting restrictions in regulations, intended and did act in accordance with the law, where an ambiguity or interpretation of intent is necessary in construing a regulation the interpretation which most closely accords to the law (here the objectives of the statute) must be adopted. Thus the subject regulation must be construed so as to give effect to as many of the objectives and guides of the Surplus Property Act of 1944 as is possible under the circumstances. Conversely, any interpretation of the regulations of the regulatory body which do not meet those objectives and guides, or as many of them must be disregarded.

In the instant case it appears clear, upon examining the many objectives of the Surplus Property Act and reconciling the conflicts that appear therein, and with requirements of educational disposal, that the regulatory body intended and reached a determination that a three-year period for restricted holding by public agencies was all that was necessary to repay the Government in education benefits (*infra,* I, B, 1, b, and c, pp. 14-25). At the same time, it was determined that a three year restricted period was as long as the regulatory body could demand a holding of such property and still comply with the other objectives

and guides of the subject Surplus Property Act of 1944. Since a full discussion of the objectives and guides of the Surplus property Act of 1944 is appropriate, both to the validity of the restrictions in regulations themselves and the argument presented in this paragraph, *i.e.,* the necessity of the subject three year period, the next paragraph will treat both topics at the same time.

B. The restrictions on flight use and resale by public agencies as contained in the subject Regulation 4 (32 C. F. R., 1946 Supp., Sec. 8304.11(b)), and consequently the executed Form 65 Agreement were invalid as not being in accordance with the Surplus Property Act of 1944 (58 Stat. 358). Said Agreement must be read as though the invalid provisions were not contained therein. (*United States ex rel. Accardi v. Shaughnessy, supra.*)

1. The Court, as indicated hereinabove, implies in its decision that with the appropriate Regulation read into the executed WAA Form 65 after three years the District could resell the aircraft in suit for flight purposes [R. 134-138], without the consent of the Government, since the District held the aircraft over three years (4 years here). However, the Court assumes, for the purpose of the next part of its decision, the flight restriction was one which remained effective beyond the three year period, *i.e.,* a covenant running with the aircraft. The Court then shows in its decision by comparing the subject restrictions with the "objectives" of Congress in the Surplus Property Act of 1944 [R. 135-136] that such restrictions are invalid. The decision of the District Court in this connection is a study in itself of a com-

plete, clear and succinct statement showing the obvious conflict between these objectives and the subject restrictions. These objectives are going to be considered in detail in this brief, to not only to support the District Court's decision in this regard, but also to show that even assuming this Court should disagree with the District Court as to the *validity* of *any* such restrictions in the regulations, it would be necessary, in conforming the conflicts in the objectives themselves and the necessity that the Government receive "fair value," to find that the restrictions on public agencies concerning *both* resale and flight use for any purpose were *intended* and only could be intended by the regulatory body to remain in effect for a reasonable period of time, said period of time has been indicated by the regulatory body to be a period of three years.

a. The executed Form 65 Agreement provides in part as follows:

"Vineland Elementary School District . . . hereby certifies and agrees as follows . . . (6) that the acquired property will not be used for any actual flight purposes. (7) That all acquired property, when unfit for the above purpose, will be sold only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content. Sales consummated within three years of the date of acquisition must have the prior approval of the Disposal Agency."

The applicable Regulation 4 provided in part as follows:

"The disposal agency shall establish procedures pursuant to which education . . . institutions or

instrumentalities may make written application for surplus aeronautical property available for disposal . . . Such procedures shall include . . . (2) a certification of the purposes for which the property is to be acquired, and in the case of aircraft and agreement that it will not be flown except for purposes of research and experiment in connection with the science of aeronautics, and (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap."

Thus, the executed WAA Form 65 Agreement prohibits entirely all flight use, whereas subsection (2) of the applicable Regulation 4 permits flight for both research and experimental purposes. Moreover, the restrictions as to disposal contained in the Form 65, in paragraph (7) thereof, are without limit in point of time, whereas subsection (3) of the amended Regulation limits restrictions upon disposal only to a period of three years next following purchase.

b. The objectives of the Surplus Property Act of 1944 are set forth in Section 2 of said Act. Each provision is herein set forth with our notation thereafter as follows:

"Sec. 2. The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—

"(a) to assure the most effective use of such property for war purposes and the common defenses";

Any restrictions on flight use, even for research and experimentation, and resale by a public agency

could never allow an effective use or any use for war purposes and the common defenses.

"(b) to give maximum aid to the reestablishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment";

Clearly, only a right to unrestricted resale and flight uses would give any aid to the re-establishment of free independent private enterprise and the development of independent operators and stimulate full employment. Certainly, a restriction on flight use and resale, unless the aircraft was mutilated to basic material content, would be contrary to this objective.

A 3 year maximum waiting period could be construed as appropriate under this provision.

"(c) to facilitate the transition of enterprises from wartime to peacetime production and of individuals from wartime to peacetime employment;"

Only a right to unrestricted resale and flight use would be applicable since such would be the only feasible peacetime use of the facility. A three year maximum waiting period, however, could be construed as appropriate.

"(d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in any economy of free enterprise;"

Clearly, again the unrestricted right of resale and flight uses would strengthen and preserve the competitive position of *small* businesses and discourage monopolistic practices.

"(e) to foster and render more secure family-type farming as the traditional and desirable pattern of American agriculture;"

This section would not appear to be applicable to the subject case and is one which could be and was ignored by the regulatory body in adopting the subject Regulations. The government would have us believe in their brief (p. 26), however, that a disposal agency and the regulatory body could ignore many of the objectives of the subject Act and only adopt a few of its regulations merely because of provisions such as this one which, in the particular instant, would not apply. Merely because a provision as clear as this one does not apply does not mean that the regulatory body and the disposal agency can thereby ignore many of the other objectives of the Act without making any attempt to adopt a regulation and agreement which accords with as many of the subject objectives as are applicable and possible.

"(f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises;"

How could a returning veteran be given opportunity to establish himself as a proprietor in the aeronautical business or enterprise unless he was given an opportunity to purchase the subject aircraft through a resale from the public agencies? The instant case is directly in point since the Finns are veterans and apparently intended to establish an independent small business. [R. 151.]

"(g) to encourage and foster post-war employment opportunities;"

It is clear no post-war employment opportunities are afforded by school districts hoarding aircraft forever or reducing them to their basic material content.

"(h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;"

It must be kept in mind that before a disposal agency could transfer surplus aircraft to a school district, that it was required and did find that such aeronautical property was "commercially unsalable." [R. 509.] A clear interpretation of this provision and a finding by the applicable disposal agency in connection with the subject aircraft that the subject aircraft was "commercially unsalable" can be found in the front page, under paragraph II, of a document entitled "War Assets Administration," Vineland's Exhibit "E," wherein it is stated as follows:

"Distribution under this plan will be confined to aeronautical property which has been determined by the disposal agency to be commercially unsalable by reason of its condition resulting from damage, wear obsolescence, or otherwise, *has no reasonable prospect of sale except as scrap,* or with respect to which *by reason of its large supply or prior use the estimated cost of care, handling and disposal will exceed the estimated proceeds unless it is promptly sold as scrap, or* with respect to which *the estimated cost of care, handling and disposal will exceed the estimated proceeds as scrap, or otherwise.*"

Thus, it would appear that the regulatory body and the disposal agency at the time of offering the

subject aircraft for sale to the Vineland School District did so with the assurance, and only after an investigation and administrative determination, that such a sale would not be one from which speculators could obtain large or any profits. That this finding was appropriate and accurate is further evidenced by the fact that the subject District received no offers for the subject aircraft until the year 1950, after the Korean War had broken out. The plane had *no* value in 1946 and until the Korean War came along. [R. 895.] Particularly with reputed restrictions thereon. [Duly testimony, R. 299.] (See also testimony *re* Duly statement that Finns should throw gasoline on the airplane in suit and burn it up.) [R. 418-419, 413-414.]

A three year maximum restriction on resale could be construed as appropriate here in the regulation and agreement to prevent school districts from being a channel whereby speculators would be able to obtain surplus aircraft for resale at a profit. In the year 1946 such surplus aircraft were a "drug on the market" [R. 533-535], and after a three year holding period by school districts and use by said districts for educational institutions, and its consequent deterioration, obsolescence, wear and tear to said surplus aircraft, it seems only reasonable that the regulatory body determined and intended that unrestricted resale by a school district would not violate the subject objective of the Act. Said aircraft would be even more a "white elephant," [R. 420] and after such use be of no value, and certainly less valuable, for the purposes of speculation. The Korean conflict certainly was not contemplated in 1946.

"(i) to establish and develop foreign markets and promote mutually advantageous economic relations between the United States and other countries by the orderly disposition of surplus property in other countries;"

Certainly, this objective could not be complied with by a restriction on all flight uses and right of resale. To the contrary, the subject sale would have allowed the exact objective set forth herein. Finns indicated they had a desire to fly freight between Mexico and the United States.

"(j) to avoid dislocation of the domestic economy and of international economic relations;"

As pointed out in our discussion of objective (h) hereinabove in 1946, the subject aircraft was apparently not considered "commercially salable," and therefore even if schools sold said aircraft, there would be no large price therefor, nor would such a "white elephant" cause any dislocations.

It would seem reasonable that the regulatory body placed the three year restriction in the subject regulation for the purpose of satisfying this objective, since as pointed out in our comment to (h) hereinabove, the regulatory body apparently intended that there be some restrictions for an adjustment period of approximately three years, but after such period (1946 to 1949) any possibility of "dislocation" would be over.

"(k) to foster the wide distribution of surplus commodities to consumers at fair prices;"

There clearly would be no wide distribution, nor in fact none at all, to consumers at fair prices or

any price if there were no provisions for resale by a public agency and if it was necessary for such an agency to reduce the property to basic material content.

"(l) to effect broad and equitable distribution of surplus property;"

Again, there could be no broad and equitable distribution of surplus property if such property were to remain in the control of a public agency forever or reduced to basic material content.

"(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;"

As previously indicated, in discussing objectives (h) and (j), the disposal agency apparently did not believe the subject aircraft was commercially salable so as to cause any dislocation at the time the subject aircraft was sold. It appears that this very difficult objective demanding both prompt and full utilization of surplus property and yet a regard for protection of free markets and competitive prices from this dislocation by uncontrolled dumping could be construed as ingenuously covered by the regulatory body in indicating *prompt disposal* to education institutions yet with the demand that such educational institutions hold said property from the market for a period of three years, after said period the property could be sold without restriction, thus giving full utilization to the consumers. Certainly, once again there

could not be prompt and full utilization of the subject property if it were determined that school districts could never resell the subject property for flight purposes or without reducing it to basic material content.

"(n) to utilize normal channels of trade and commerce to the extent consistent with efficient and economic distribution and the promotion of the general objectives of this Act (without discriminating against the establishment of new enterprises);"

What better way to utilize normal channels of trade consistent with *efficient and economic* distribution *without discriminating* against the establishment of new enterprises than allowing resale by other public agencies who are almost uniformly demanded by law to sell personal property of said agency by means of competitive bidding to the highest responsible bidder. To restrict resale to non-flight use or reduction to basic material content would certainly discriminate against establishment of new enterprises.

"(o) to promote production, employment of labor, and utilization of the productive capacity and the natural and agricultural resources of the country;"

Certainly, there could be no such promotion and utilization by a restriction as to resale and a necessity to reduce the property to basic material content.

"(p) to foster the development of new independent enterprise;"

There is *none* without resale and future flight uses.

"(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;"

As pointed out in our discussions of (h) and (j) hereinabove, in 1946 the regulatory body and the disposal agency determined the subject plane was "commercially unsalable," and therefore would have been reasonable in determining that "insofar as possible" there could not be unusual and excessive profit made out of the resale by public agencies of surplus property. Such was clearly the case until the Korean conflict. Once again the three year *maximum* limitation could be found as intended to resolve this objective. Surely after a holding thereof by public agencies for a period of three years, and an educational use by such public agencies with its consequent deterioration, obsolescence, wear and tear on the subject property, would leave little doubt in 1946 that no profits could be made out of such property. Again, it was only the Korean conflict, unforseeable to the regulatory body or school district, which caused any price increase making possible a profit in the subject surplus property.

"(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers;"

This most difficult objective which appears contradictory in itself demanding a prompt disposal without fostering monopoly, disturbing or encouraging hoarding and yet facilitating a prompt redistribution

to consumers would *only* be complied with under unrestricted rights of resale and flight use in the public agency or at most a three year restriction to pay "benefits" to the Government. Certainly, there would be a *hoarding* and *no redistribution* to consumers and there would be a fostering of *monopoly* and *restraint of trade* if it were intended that school districts must hold the aircraft forever or reduce it to basic material content.

"(s) to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system; and"

There certainly could be no developing of an adequate and economical national transportation system if public agencies were not allowed to resell without having to reduce to basic material content or were not even allowed to use such aircraft for any flight purposes, including research and experimentation. The instant case is a perfect case of a sale made tending to promote development and competition in the national transportation system.

"(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition."

A disposal of the subject school district of a "commercially unsalable" aircraft for Two Hundred Dollars ($200) was, in all probability, not only "fair value" in 1946, but a "God send" to the Government, another "white elephant" being taken off its hands, [R. 533-535, 420], without the necessity of advertising for bids, etc. The administrative agency had determined the aircraft "had no reasonable prospect of

sale except as scrap," or "by reason of its large supply or prior use the estimated cost of care, handling and disposal will exceed estimated proceeds . . .", "or with respect to which the estimated cost of care, handling and disposal will exceed the estimated proceeds as scrap, or otherwise." See also "Sales Receipt" [International's Ex. A-1] that $200 was "payment in full" for the subject aircraft.

It would seem reasonable to find that the regulatory body intended, in adopting the three year provision demanding a holding of the subject surplus property by public agencies, did so "as nearly as possible" to obtain sufficient educational use by such a public agency. The federal government would thus obtain its "fair value" by such an educational use by public agencies, in addition to the Two Hundred Dollars ($200) cash value paid for the subject aircraft. See "Sales Receipt" [International's Ex. A-1], however, that $200 was "payment in full" for the subject aircraft. It seems only reasonable that in 1946, when the subject aircraft had little market value and were a "drug on the market," that in three years, said aircraft, with their subsequent deterioration and obsolescence would be of no value or practically valueless, and during said three years, the Government would obtain any and all reasonable anticipated benefits to be derived by the Government through educational use. The advisory jury adopted a value of Five Thousand Dollars ($5,000) on the aircraft in suit when it was transferred to the school district. (But Government's witness Duly indicated that was the value in 1947 or 1948. [R. 281, 300.]) No value in 1946. [R. 895.] Burn it up. [R. 418-419,

413-414.] Only metal with restrictions Duly. [R. 299.] However adopting the value of Five Thousand Dollars ($5,000) for the subject aircraft at the time it was transferred to the Vineland School District; the School District paid a sum of Two Hundred Dollars ($200) for the subject aircraft, it would seem reasonable that the regulatory body intended and determined the sum of One Thousand Six Hundred Dollars ($1,600) per year ($4,800 for three years) would be an adequate return to the Government through a school district's use of the subject aircraft for education purposes for a period of three years. This is particularly true in the instance of the Vineland School District, which used the subject aircraft for a classroom, in addition to other instructional and educational purposes, thus saving the public, for a period of four years, the expense of constructing a temporary classroom or leasing such a classroom, in order to take care of a great need for such a facility by the District. [See film, Deft. Vineland's Ex. "F," R. 510-512.]

c. The restriction against flight use and resale as they appear in the appropriate regulation and WAA 65 agreement was thus invalid. Said agreement must thus be read as though such restrictions are not contained therein. However, giving the regulatory body the benefit of a presumption of validity the only way such restrictions can be found to be valid is to interpret them as being limited to a reasonable time, in this instance three (3) years.

C. The Government indicates in its brief that "the legislative history demonstrates that Congress intended such restrictions." To the contrary, such legislative history clearly demonstrates that Congress never intended such restrictions and demanded the *removal* of any such restrictions.

The Government in its brief sets forth various acts in detail which recite therein, in general, that terms, conditions, reservations and restrictions, etc., which have been imposed are not to be disturbed. Obviously Congress in any subsequent enactment of its own which refers to its previous acts will make a general statement concerning the conditions in previous act; however, this in no way makes legal or proper any terms, conditions, reservations or restrictions which may have previously been imposed by a regulatory body or administrative agency which were not authorized by law or appropriate regulation.

Congress clearly indicates in its most recent enactment (1955) its intent that the subject restrictions were never intended and any existing *legal* restrictions are no longer to be effective, Public Law 61, 84th Congress, First Session (H. R. 3322), Section 4a thereof, provides:

> ". . . In the case of personal property donated or sold at a discount for educational, public health or memorial purposes, including research, under any provision of law enacted prior to the enactment of the Federal Property and Administrative Services Act of 1949, no term, condition, reservation, or restriction imposed on the use of such property shall remain in effect after the date of the enactment of this Act."

Congress then continued to protect the United States on any *proper* litigation then pending by providing:

> "This subsection shall not be deemed to terminate any civil or criminal liability arising out of a violation of such a term, condition, reservation, or restriction which occurred prior to the enactment of this Act, if a judicial proceeding to enforce such liability is pending at the time of, or commenced within one year after the enactment of this Act."

This enactment clearly indicates that instead of showing an intent that terms, conditions, reservations or restrictions on the *use* of such property are to be recognized, that any and all of such restrictions instead are to be removed completely and immediately. Upon having the surplus property program completely aired before the House Committees, and a detailed investigation having been made in connection with the Act of 1955, set forth hereinabove, it goes without saying that if Congress intended that the restrictions that the Government would have us now enforce, were to have been imposed in the first place under the Congressional Act, particularly now that confusion has arisen in connection therewith, the Congress would have enacted a public law, fully setting forth such restrictions and giving the administrative agency clear power of enforcement thereof; but to the contrary, Congress chose to do away with any such terms, conditions, reservations or restrictions whatever, imposed upon the use of any such property, thus clearly, indicating their intent in this regard.

D. In summary the following propositions thus appear:

1. The provisions of the executed Form 65 agreement concerning restrictions on flight uses and resale of the subject aircraft were clearly inconsistent and erroneous and thus invalid when compared to the appropriate Regulation 4.

2. The appropriate Regulation 4 (assuming it valid), contains a limitation on restrictions to three years, which must be read into the executed agreement, the agreement would thus contain *no restrictions* for resale by school district for *any purposes* including a contemplated flight use. Therefore the subject transfer by Vineland School District was not contrary to said agreement nor any regulations of the Government.

3. Assuming that the flight restriction is determined as a covenant running with the aircraft and does not expire at the termination of the three-year period indicated in the appropriate Regulation 4, such a restriction appearing in the regulation and, consequently, in any agreement is invalid as not complying with the general objectives as set forth by Congress in the Surplus Property Act of 1944. Therefore the executed WAA Form 65 Agreement must be read without any restriction on flight use as such restriction may appear in said agreement or in the appropriate Regulation 4.

4. Assuming that this Court does not agree with the District Court that the restriction on flight use is invalid and should not appear in the appropriate Regulation 4 at all. It must nonetheless be deter-

mined in order for the appropriate Regulation 4 to comply with the objectives of the statute that the regulatory body intended and made a part of said Regulation 4 a requirement that such a restriction on flight use and necessarily any restrictions on resale of aircraft held by public agencies *would expire* in a reasonable time after acquisition of such aircraft; and that such a reasonable time was determined and intended by the regulatory body in adopting the subject Regulation 4 to be a period of *three years.* Therefore, inasmuch as the school district held the subject aircraft for a period of four years from the date of purchase, the subject transfer did not violate the executed War Assets Administration Form 65 as read with the appropriate regulation, nor with any other rules or regulations of the Government.

5. Contrary to the Government's allegation, Congress has indicated its intent by recent legislation that "no . . . restriction on use shall remain in effect." If its intention were to the contrary, Congress could have resolved any ambiguities in this field by clarification legislation and a ratifying of such restrictions, and provide enforcement thereof.

II.

Assuming This Court Finds the Restrictions Against Resale and Flight Uses by the School District Were Not Invalid, and Further Assuming the Three Year Provision Did Not Release the District of Said Restrictions, the District Did Not Violate Such Restrictions Inasmuch as There Was No Transfer of Right, Title or Interest in the Aircraft in Suit to the Finns.

A. It is conceded by the Government (see "Brief for the United States," II-B, pp. 66-70) and it is clear that there was no transfer of right, title or interest, nor a general right of possession, to the Finns by School District for the following reasons:

1. In accordance with the agreement [Vineland's Ex. "B," R. 59] and documents related thereto between the School District and the Finns, right, title and interest to the aircraft in suit did not pass to Finns until all *conditions precedent* of said agreement and said documents should be performed by Finns; and since said conditions precedent had not been performed, School District was and is entitled to immediate possession of the aircraft in suit, and was and is the owner of all right, title and interest thereto. (See Appellant Vineland's Op. Br., Argument I, pp. 8-13. See also "Brief for the United States," II-B, pp. 66-70.)

2. The agreement [Vineland's Ex. "B," R. 59] and documents related thereto between School District and Finns was a *conditional sales contract,* a condition or conditions of which had not been performed by Finns, and therefore the School District was and is entitled to immediate possession of the

aircraft in suit, and was and is the owner of all right, title and interest thereto. (See Appellant Vineland's Op. Br., Argument II, pp. 14-16. See also "Brief for the United States," II-B, pp. 66-70.)

3. The sale of the aircraft in suit by School District to Finns was illegal and void, the agreement between School District and Finns [Vineland's Ex. "B," R. 59], a bill of sale executed by defendant Bancraft in favor of Finns [Finns Ex. "K-4"], and any other agreements and instruments concerning the sale of the aircraft in suit by District to Finns were illegal and void for the same reasons that the subject sale was illegal and void. (See "Brief for the United States," II-B-1, pp. 69-70.)

B. The Government indicates in its Brief (pp. 51-55) that, if this Court should determine that Vineland did not manifest an intention to transfer title to Finns, at least until the necessary Governmental releases had been obtained, or for other reasons indicated in Appellant Vineland's Opening Brief, neither title nor possession to the subject aircraft was ever transferred to Finns from Vineland (the Government concedes Vineland's position has substantial merit in this regard in its Brief, pp. 51, 67-70), and assuming this Court determines that the restrictions against resale and flight use were valid, the Government is nonetheless entitled to damages against Vineland for breach thereof. The Government's contention, in general, is based upon these three propositions: (1) The District's action might have permitted conveyance of good title to a bona fide purchaser; (2) Vineland's permitting Finns to fly subject aircraft from the school to Los Angeles violated the restriction on "any

flight purposes"; (3) Assuming neither of the last two arguments are accepted by the Court, that Vineland violated the clause requiring the subject plane be reduced to its material content if sold as scrap.

1. The Government's first contention that Vineland's action might have permitted conveyance of good title to a bona fide purchaser is purely speculative and contrary to law.

a. A speculative conclusion that a bona fide purchaser *might have* obtained title has no place in the consideration of a Court of law, particularly as part of complaint for *actual* damages to a plaintiff. No such conveyance occurred here.

b. The *law* is clear that even a bona fide purchaser does not have any rights as against the owner of legal title on a conditional sale. (See Appellant Vineland's Op. Br., Argument I-F-1, p. 13; *Oakland Bank and Savings v. California Pressed Brick Co.,* 183 Cal. App. 295, 297; *Phelps v. Loupias,* 97 Cal. App. 2d 350.) The Government in presenting this argument has conceded that the subject sale was a conditional one. ("Brief for United States," p. 52.)

c. Even assuming the Government's position to be accurate the Government's remedy is injunction or at most nominal damages. (*Infra,* VI, pp. 56-61.)

2. The Government's second contention is set forth on page 53 of the "Brief for the United States" wherein it is indicated ". . . Vineland . . . breached the conditions restricting the use to which the plane *might* be put; *i.e.,* that the plane was to be used for non-flight instructional purposes

[Paragraph 2, R. 15] and that it 'will not be used for any actual flight purposes' [Paragraph 6, R. 15]."

a. Again the Government is dealing in mere speculation in indicating a breach of a use which *"might be put."* What the School District knew as to what the aircraft in suit "would be" used for is pure speculation. The Agreement provided also for scrapping of the plane in suit or release of the entire Agreement as to defendants Finn. Even assuming the District knew and intended an eventual flight purpose, it cannot be said that a void or illegal act and/or that an unexecuted *attempt* to allow the subject aircraft to be used for flight purposes is a breach of the subject paragraph of the WAA Form 65 Agreement.

It is to be noted in studying both Paragraph 2 and Paragraph 6 of the executed WAA Form 65 Agreement [R. 15] that the flight restriction contemplates a *use and purpose* which is non-flight in nature. Certainly, such a *use* and *purpose* contemplated more than one or an occasional such use. Such a singular or occasional flight use may well have been within a non-flight use recognized for educational purposes. Since the word "use" ordinarily contemplates a *continuing* activity and not just occasionally or one instance, clearly one flight could not be construed as a violation contemplated within the restriction of the subject Form 65 Agreement. This is particularly true in the instant case when we consider that the subject flight was consented to by the district for the *"sole purpose"* of enabling work to be done upon said aircraft which could not be completed on

the school district grounds. [Special Verdict, Interrogatory 7, R. 113.] Said flight in itself for such purposes could still be construed as a valid *educational use* and *purpose* and would not be a *use* of the subject aircraft for a flight *purpose.*

(1) The subject flight by defendants Finn was in keeping with the education use of the subject aircraft, inasmuch as whatever work was to be done upon the subject plane, and whatever materials were to be added thereto would inure to the benefit of the district and would, in the event defendants Finn did not obtain the proper consents and releases of the Federal Government or perform all of the conditions of their contract with the district, make said aircraft an even better and more complete plane for educational uses to the Vineland School District. Uncontradicted testimony at the trial showed that the Defendants Finn returned the subject aircraft to Bakersfield after the subject work was done on said plane, and that the return of said plane was accomplished by Defendants Finn in keeping with the above indicated intent that the school district use should continue. [R. 474-475.] Only actions of the Defendants Finn in connection with their difficulties with International Airports, Inc., and the plaintiff United States of America then prevented further educational use.

b. Even assuming the District knew and intended eventual flight purposes, the evidence is clear that the real *use* and *purpose* of said aircraft remained *educational until all consents* had been obtained and all conditions of the contract [Vineland's Ex. "B," R. 59], had been performed. This is clear

in the evidence presented in the subject action by the Agreement [Vineland's Ex. "B"], by the special verdict of the jury [R. 112-113], and Finn return of the aircraft to Bakersfield. [R. 474-475.]

(1) The Agreement [Vineland's Ex. "B," R. 59], provides that the *use* of the subject aircraft shall remain in the school district. [R. 60.] This use is to remain in the District even assuming for the purposes of this argument that the title and possession passed to defendants Finn by said Agreement or by bill of sale issued thereafter, or by release of the physical possession of the plane in suit.

(2) The jury, in its special verdict, indicates this finding in answer to Interrogatory No. 7 [R. 113], wherein it determined, in general, that defendants Vineland Elementary School District and Peter A. Bancroft intended that the physical possession of the airplane in suit was given to defendants Finn for the *sole* purpose of enabling work to be done on the aircraft which could not be done on the school grounds, and in answer to Interrogatory No. 2 [R. 112], wherein it determined, in general, that the defendant District did not intend to transfer title to the airplane in suit to defendants Finn at any time before all necessary consents and releases and waivers of the Government had been procured.

c. In connection with the Government's argument that Vineland has breached the non-flight restriction, the Government also alleges on page 54 of its Brief that Vineland, in releasing the subject aircraft to defendants Finn for a flight to Los Angeles to have work done thereon, was "conduct, which viewed even

in its best light, constituted negligent disinterest. . . ." It would appear to be unreasonable to hold a school district superintendent to a requirement that he know whether or not waivers or releases have been obtained through all administrative agencies of the United States Government in Washington after he has been shown a proper Civil Aeronautics Administration certificate of flight clearance, and assured by the persons with whom he is dealing and has confidence that such flight certificate cannot be issued without proper clearance of other federal agencies concerned. It also seems clear that said superintendent took the only reasonable action, in connection with checking said documents, available to him at the time and under the circumstances by attempting to contact his legal counsel, who, unfortunately, was not in town at the time. [R. 539-540.] Even then it is clear that the School District *only* released physical possession of the aircraft to allow the work to be done upon the aircraft [Interrogatory No. 7, R. 113] and by agreement, the educational *use* of the subject aircraft continued in the district [R. 60], and it was the intention of the District that title should not pass on the subject aircraft until all releases were obtained. [Vineland's Ex. "B," R. 59; Interrogatory No. 2, R. 112.] Is this to be construed as negligence on the part of the district? Compare the district's extreme care and spirit of cooperation in indicating to bidders and in its agreement with the Finns that Government consent be obtained. This in face of the fact that the law provides, as pointed out herein and by the district court that no such releases were

necessary. If anything, the district's actions have indicated an "abundance of caution."

3. As to the last contention of the Government, clearly Vineland never delivered the subject aircraft nor legally released possession or custody of the plane and therefore could not have violated the scrap clause of the executed Form 65 whether or not a technical distinction is made between the words "scrap" and "salvage". In fact, the Government, in taking up the technical argument of the distinction between salvage and scrap (Govt. Br. pp. 54-55), prefaces its remarks by indicating ". . . even if . . . Vineland had not released custody of the plane prematurely . . .," how can the District be held to have violated the scrap warranty clause if Vineland has not released custody of the airplane and it is thus technically in the control of Vineland. [If all other determinations are in favor of the Government, there may be a right to injunction (for continued educational use) or nominal damages due the Government (see *infra,* VI, pp. 56-61) but certainly nothing else.]

The Agreement between Vineland and Finns [Vineland's Ex. "B," R. 59] clearly indicated that it was subject to releases and consents of the Federal Government. Thus even if it be determined that there was a technical violation of the scrap clause in that the word "salvage" was used instead of the word "scrap," no such sale occurred until releases of the Government had been obtained therefor.

Although there appear to be technical provisions in the law distinguishing scrap and salvage, it does not appear that the District in advertising the subject aircraft for sale, in executing an agreement in connection therewith, or in any of its actions in connection with such a sale or release of physical possession thereof intended to do anything except comply with the law as it then existed as between the Government and the School District. It appears reasonable that the District in inserting the salvage clause in the subject agreement did so in order to comply with the "scrap" clause of the War Assets Administration Form 65 Agreement. There would be no other reason for the clause being inserted. A public agency is presumed to act in accordance with the law. To hold a Board of Trustees of a School District made up of a group of farmers in a very poor area [R. 510] to a technical distinction between scrap and salvage would be clearly unreasonable and unjustified.

III.

Appellee School District Is Not Estopped to Deny That the Terms of WAA Form 65 Are Valid or to Deny That a Breach of the Terms Entitles the Government to Retake the Plane.

A. Regardless of the belief of either or both the Government and Vineland as to what was the legal effect of the restrictive terms of WAA Form 65, Vineland is not now estopped to show that the effect was different than believed by said parties at the time of execution of the agreement. If the Government seeks to raise an estoppel by deed to establish a proprietary interest of its own in the plane, the effort must necessarily fail in view of the holding of the court below that the restrictions contained in WAA Form 65 were unauthorized and improper under the governing statute. Neither waiver nor estoppel will lie to give validity to the conduct of the disposal agency in placing unauthorized restrictions in the agreement transferring the plane which was contrary to public policy or statutory law designed for the public benefit. (*Almassy v. Los Angeles Civil Service Commission,* 200 P. 2d 846, subseq. op. 34 Cal. 2d 387, 210 P. 2d 503; *Roberts v. Roberts,* 81 Cal. App. 2d 871, 185 P. 2d 381; *Dickey v. Raisin Proration Zone No. 1,* 140 P. 2d 53, subseq. op. 151 P. 2d 505, 24 Cal. 2d 796, 157 A. L. R. 324, cert. den. 65 S. Ct. 1013, 324 U. S. 869, 89 L. Ed. 1424, reh. den. 65 S. Ct. 1183, 325 U. S. 893, 89 L. Ed. 2004.)

B. The doctrines of estoppel by conduct and ratification have no application to a contract which violates the express mandate of the law. (*Herkner v. Rubin,* 126 Cal. App. 677, 14 P. 2d 1043.) Furthermore, even if

it should be held that the restrictions contained in WAA Form 65 were not contrary to public policy or statutory law, still an estoppel should not be raised against Vineland in view of the fact that the restrictions contained in said WAA Form 65 were immaterial to the conveyance. At best the restrictions were merely contractual, and they were unnecessary to the conveyance.

1. A party to a conveyance is not estopped by recitals immaterial and unnecessary to said conveyance. (*Osborne v. Endicott,* 6 Cal. 149, 65 Am. Dec. 498; *Marlenee v. Brown,* 128 P. 2d 137, subseq. op. 134 P. 2d 770, 21 Cal. 2d 668; *Simson v. Eckstein,* 22 Cal. 580; *Redman v. Bellamy,* 4 Cal. 247.)

2. The restrictions were immaterial to the conveyance, since WAA Form 65 failed to go further and provide that there would be a reverter of title to the plane to the Government in the event of a breach of the restrictions. No reverter in the event of breach will be read into the conveyance of the plane, since forfeitures are disfavored in the law. [R. 130.] The law also looks with disfavor on restraints against alienation. [R. 130.]

C. An estoppel resting in deed means only that a litigant is forbidden to show the existence of a fact, where by such deed it would work injustice and injury to his adversary to permit him to do so. (*Allen v. Hance,* 161 Cal. 189, 118 Pac. 527.) Here there can in fact be no injustice worked on the Government by giving effect to the statutory rule governing disposal of surplus aircraft to educational institutions as pointed out by the Court below since the Government was in a far more favorable position than Vineland to know that the restrictions con-

tained in WAA Form 65 were invalid and of no effect under the governing statute.

D. Similarly, the instant case does not involve the proper type of fact situation for the application of the doctrine of equitable estoppel, or estoppel *in pais*.

1. To constitute an equitable estoppel five elements need be present: a false representation or concealment of material facts; knowledge, actual or constructive, of the true facts; ignorance of the party to whom representations were made of truth of the matter; intent, actual or constructive, that said party should act on it; and an act in reliance thereon. (*Faulkner v. Bank of Italy,* 69 Cal. App. 370, 231 Pac. 280.) The doctrine proceeds on the theory that the party has by his declarations or conduct misled another to his prejudice, so that it would be a fraud on the latter to allow the true state of facts to be proved. (*American National Bank of San Francisco v. A. G. Sommerville, Inc.,* 191 Cal. 364, 216 Pac. 376; *Parker v. Funk,* 185 Cal. 347, 197 Pac. 83; *Burritt v. Dickson,* 8 Cal. 113.)

2. In the instant case, there were no misrepresented or concealed facts nor misleading declarations or conduct by Vineland, but rather the controversy has arisen over what is the proper interpretation and effect to be given to the restrictions appearing in WAA Form 65. In other words, the action involves the question of what is the applicable law, and it is clear that a mistake of law is not ground for an estoppel, *Stewart v. United States,* 24 Fed. Supp. 145, reversed 106 F. 2d 405, cert. granted *United States v. Stewart,* 60 S. Ct. 711, 309 U. S.

647, 84 L. Ed. 999, reversed 61 S. Ct. 102, 311 U. S. 60, 85 L. Ed. 40, reh. den. 61 S. Ct. 390, 311 U. S. 729, 85 L. Ed. 477, affirmed 117 F. 2d 743; *Van Antwerp v. United States,* 17 Fed. Supp. 229, reversed 92 F. 2d 871.

3. Furthermore, the Government must be charged with having had knowledge of the governing law and the true meaning and effect to be given the restrictions, since it was the Government itself which formulated and adopted the statutes under which those restrictions were purportedly framed. Accordingly, it cannot be said that the Government was mislead in any manner by Vineland. (*California Pear Growers Assn. v. Hersprings,* 60 Cal. App. 503, 213 Pac. 518.)

E. Appellant Government cites Vineland's acquiescence in the Government's administrative interpretation of the effect to be given to the restrictions contained in the WAA Form 65 as constituting a ground for estoppel (Govt. Br. p. 48). That position is erroneous, since Vineland's action constituted neither a ratification of the administrative interpretation nor a waiver of the benefits to be derived from the correct interpretation to be given said restrictions.

1. There could be no ratification since a ratification must be in the same form as the original authority, and there can be no ratification where the restrictions were immaterial and unnecessary to the conveyance. (*Cf. American National Bank of San Francisco v. A. G. Sommerville, Inc.,* 191 Cal. 364, 216 Pac. 376.)

2. Nor did Vineland's acquiescence in the Government's interpretation of the restrictions constitute a waiver of the correct interpretation to be given those restrictions, since a waiver occurs only where there is an intentional relinquishment of a *known* right (*Pacific States Corp. v. Hall,* 166 F. 2d 668; *Michener v. Johnston,* 141 F. 2d 171; *Robinson v. Johnston,* 50 Fed. Supp. 774; *Wienke v. Smith,* 179 Cal. 220, 176 Pac. 42), and here Vineland did not know that the restrictions contained in WAA Form 65 were in law and in fact invalid.

F. As an additional argument against the raising of an estoppel against Vineland in the instant case, it must be remembered that estoppels are not favored in law and may only be raised where the facts clearly warrant. (*Beard v. Melvin,* 60 Cal. App. 2d 421; *Selinger v. Milly,* 51 Cal. App. 2d 286; *Murphy v. Clayton,* 113 Cal. 153, 45 Pac. 267.)

G. This Appellee has been unable to find where the Government raised the subject issue of estoppel in the court below. Certainly there are no such pleadings or prayer, nor is it mentioned in the decision, therefore such an argument has no place in a brief before this court.

IV.

In Transferring the Subject Aircraft to Vineland School District, the Government Retained No Interest in Said Aircraft Entitling It to Possession Thereof.

As pointed out previously in this brief and by the District Court in its decision, Vineland has not breached any conditions of the WAA Form 65 Agreement. However, assuming for the purposes of this argument that such a breach is found by this Court, it is clear in the decision of the District Court, and as shall be pointed out in the following material, that the Government retained no right of reentry, forfeiture or other interest entitling it to possession of the subject aricraft.

The Government, in its Brief, to substantiate its argument that if retained a proprietary interest in the aircraft in suit and a right of re-entry therefor, sets forth a detailed analysis of *possible* characterizations of the Government's rights in the subject aircraft; *i.e.,* bailment, trust, determinable fee. Although the Government's discussion in connection with these possible characterizations is a detailed dissertation, it appears clear from the plain language of the documents, regulations and statutes being considered that the only characterization which can properly be placed upon the transaction between the Government and the School District is that it was a "sale" (Surplus Property Act of 1944 demands a "sale" or "lease" [R. 129]), and at the time of the transfer of subject aircraft, the regulation authorized only a "sale." [R. 129.] No language of bailment or trust anywhere appears. A determinable fee is properly a real property matter.

Therefore, the only appropriate discussions in connection with said sale would appear to be whether or not the sale was conditional, with a right of re-entry, or forfeiture reserved in the Government. In face of the clear language of the WAA 65 Agreement, "Sales Receipt," other documents relevant to the subject transfer, applicable regulations and statutes, to hold that the Government has reserved a right of re-entry or forfeiture or that the subject transaction is a bailment, trust or determinable fee would be for the court to *rewrite* the agreement between the parties.

The Government has pointed out in its Brief (p. 40) that any ambiguity in a grant is to be resolved favorably to a sovereign grantor—"Nothing passes but what is conveyed in clear and explicit language." The Court's decision in connection with this matter is a study in itself of a concise statement excellently and fully presented, indicating that there is not only no "ambiguity" in the subject grant, but that what is conveyed in the way of title appears in most clear and explicit language." (See Decision of the District Court, pp. 128-130.) Contrary to the Government's argument, the applicable maxims which should be applied in the instant situation to determine whether or not the Government retained any interest granting a right of re-entry is the general maxim that restrictions upon title which restrain alienation and use are not favored by the law, and also the maxim that the law abhors forfeiture. As pointed out by the District Court [R. 130], "So where, as here, there are 'no express terms creating a condition, no clause of re-entry nor words of any sort indicating such purpose, the conclusion is unavoidable that the obligation in question is a covenant . . .' (Columbia Railway, etc., Co. v.

South Carolina, 261 U. S. 236, 248, 250 (1923)) for the breach of which damages would be the only remedy. (See: United States v. Michigan, 190 U. S. 379 (1903); Northern Pacific Railway v. Townsend, 190 U. S. 267 (1903); Emigrant Co. v. County of Adams, 100 U. S. 61, 71 (1870).)"

A. The Court's decision that the Government retains no interest in the subject aircraft entitling it to possession upon Vineland's breach is a succinct statement indicating no ambiguity in the grant and that what is conveyed is in clear and explicit language. The decision is condensed as follows:

1. The authority of the disposal agency to pass title is clear in the provisions of the statute that: "Surplus property . . . appropriate for school classroom or other educational use may be sold or leased . . ." (58 Stat. 770; 50 U. S. C. A. App., Sec. 1622(a)(1)(A) 1944.) It is clear in the instant case that the aircraft was not leased by the Government to Vineland. The only conclusion which must then be drawn is that it was *sold.*

2. The Court then points out that even more important, at the time the subject aircraft was delivered to the defendant School District, approximately July 25, 1946 [Pltf. Ex. 4], a *sale* was the "only permissible method of disposal," for the regulation then provided: "After June 30, 1946, transport aircraft shall be disposed of only by sale." (32 C. F. R. 1946, Supp. Sec. 8305.7.)

3. The applicable regulation indicates an intent of final sale in that it provided in part: The disposal agency shall compile a list of such items and

shall ascertain fixed *prices* . . . The disposal agency is authorized to dispose of such property to educational or public-health institutions or instrumentalities at the prices so approved . . . The property will not be *resold* to others within three years . . ." (32 C. F. R. 1946 Supp. Sec. 8304.11.) (Emphasis ours.)

4. The Court also points to the documentary evidence indicating the intention of the parties as to the nature of the interest transferred to Vineland as follows:

a. Disposal Agency's Instruction Form Sheet [Vineland's Ex. "E"] outlines in Instruction 3, "How to Purchase"; in Instruction 4, refers to the "prices."

b. As indicated above, the regulation itself refers to "prices" and "resold."

c. School Superintendent Bancroft filled out a "purchase order," WAA Form 66. [Vineland's Ex. "D".]

d. "Sales Receipt" mentioned "purchases" in the name of the School District and the "price" was assured by the disposal agency (WAA-LA-12). [Instructions, Ex. A(1).]

e. The Statute itself, as indicated above, indicates such property may be "sold or leased."

f. The applicable regulation at the time of delivery indicated "aircraft shall be disposed of only by sale."

B. In addition to those points set forth by the Court in its decision, the following considerations are offered, further indicating the clear intention that the subject

transfer to Vineland by the Government was without reservation or exception entitling the Government to possession of the subject aircraft:

1. The intention of Congress that outright sales or leases were contemplated is indicated in House Report No. 1890:

"The conference agreement (Sec. 13) retains the provision of the House bill with respect to the donation of property having no commercial value. This is the only case in which donation is authorized. The conference agreement further provides that the Board shall prescribe regulations for the disposition of surplus property to States and their political subdivisions and instrumentalities, and to nonprofit institutions, and shall determine on the basis of need what transfers are to be made. In formulating such regulations the Board is to be guided by the objectives of the act and to give effect to the following policies to the extent feasible in the public interest:

"(1) Surplus property appropriate for educational use may be sold or leased to the States and their political subdivisions and to tax supported institutions, as well as to certain other nonprofit educational institutions.

* * * * * * * *

"(3) In fixing the sale or lease value of property to be disposed of in each of the above cases, the Board is directed to take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any State, political subdivision, instrumentality or institution."

Said paragraph is carried into the Act almost verbatim. (Sec. 13(a)(1)(C).)

2. Other methods of disposition are written into the Statute and quoted below and by the Government in its Brief ("Brief for the United States," p. 24), but are *not* applicable to a disposal to an educational institution. This Section 15(a) of the Statute provides in part: "The agency may disposed of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such terms and conditions, as the agency deems proper." Since the same Act provides in Section 13 for a method of disposal to educational institutions by "sale or lease," following the doctrine of *expressio unius est exclusio alterius,* Congress must be construed as having intended that the more restricted right of disposal to educational institutions was to be strictly adhered to. Certainly, the rule of construction that the specific provision would control the general provisions is applicable. Thus, contrary to what Government would have us believe, instead of allowing the disposal agency broad discretion as said agency may have concerning disposals to other than educational institutions, such a disposal agency is even more restricted and its provisions more mandatory in dealing with such institutions.

3. Referring to the applicable regulation 4, Section 8304.11(b)(3), "An agreement that property will not be *resold* to others within three years . . ." how could there even be a *resale* of the subject property by the District unless it was clearly *sold* to the District in the first place by the Government. Thus, the Statute not only authorizes, but appears to *demand* a sale, or at least a lease. The regulation thus requires a sale (the present case

clearly was not a lease), and ultimately the Government's agents, who are presumed to know the law and interpret it properly, executed a "sales receipt" on a disposal agency's form, used for the purpose of consummating the subject transfer.

4. The sum of Two Hundred Dollars ($200), cash, was *paid* for said aircraft. The "sales receipt" indicates, in connection with the purchase price, that the payment of Three Hundred Dollars ($300) (two aircraft were purchased—Two Hundred Dollars ($200) for the subject aircraft), was "payment in full." (A conclusion may be adopted from this that future educational benefits are not even considered.)

" 'Sale' means transfer of property from one person to another for a consideration of value, implying the passing of general and absolute title, as distinguished from a special interest falling short of complete ownership." (*Charlestown etc. Bank v. White* (D. C. Mass.), 30 Fed. Supp. 416, 418.)

5. In the executed WAA Form 65 Agreement, words indicating a total interest of the Government was to be conveyed clearly appear throughout said Agreement.

a. The word "transfer" appears in the heading of said Agreement and in paragraphs 3, 4, 5, 8, and on the back of said Agreement.

b. In paragraph 7, the word "sold" is used in the first part thereof, and in the second sentence "*sales* consummated within three years . . ."

If a sale was not contemplated by such Agreement, it would not even be possible for the educational institution to ever "sell" said property with or without the consent of the Governmental agency, as scrap or otherwise.

6. In connection with the "Release of Custody of Aircraft" [Pltf. Ex. 4], the Government, in its Brief, makes note that typed thereon is the language, "This aircraft was sold for educational purposes only." The Government, of course, stresses the educational purpose. Clearly, within said clause, however, is the lone word of transfer "sold," again indicating no rights of possession retained in the Government.

C. In answer to the Court's decision on the clear and explicit language of the subject documents, indicating no retention of proprietory interest in the Government, the Government, in its Brief, argues, in general, that the Government must get educational benefits, and, therefore, couldn't have given title to the School District without some assurance of receipt of those benefits (Brief for the United States, p. 50), and for similar reasons, the Government argues that it must thus impose restrictions (Brief for the United States, p. 38).

1. Even assuming the Government *should have* such authority, and such restrictions were imposed, and assuming further that the disposal agency *should have* done so; it clearly did *not* do so in any express language, or even by implication, when the subject agreements and documents are considered as pointed out hereinabove and by the District Court. The fact that the Government *should have* done something does not mean parties dealing in good faith with the Government are bound by this ideal, particularly when contrary language clearly appears in their agreement and memoranda thereto.

2. As previously pointed out in this Brief, it would appear more reasonable that the disposal

agency and the regulatory body at the time of executing the subject agreement and delivery of the subject aircraft to the School District was satisfied that it was obtaining full value, when the School District took the subject aircraft off its hands, paying the sum of Two Hundred Dollars ($200) therefor. See "sales receipt" [International Ex. A-1] Government's *"payment in full."* Further assuming that $200 was not sufficient, the regulatory body indicated that a holding by the district for a period of three years *was sufficient* restriction and return of benefits to the Government and any rights to repossession which may have resided in the Government during said three year period would terminate.

3. Since the basis of the Government's argument is that it must be guaranteed a return of benefits through *educational use,* how can it then be argued by the Government that the Government is to get the plane back, particularly with no express or implied covenant or condition allowing re-entry or repossession. The proper remedy would have been injunction. If the argument of the Government is that it would be too difficult to fix damages for the loss of educational use, then clearly its remedy would have been to obtain an *injunction* against the School District to enforce continued educational use of the subject property. (See *infra,* VI, pp. 56-61.) At most, it would appear that only nominal damages would be due the Government for loss of educational benefits. These damages could only be nominal after a use of the subject aircraft by the School District for a period of four years as in the instant case. (*Infra,* VI, pp. 56-61.)

V.

The Government Has No Cause of Action Against Peter A. Bancroft for Inducing Breach of the WAA Form 65 Agreement Between School District and the United States. The Decision of the District Court, Dismissing the Government's Action Against Bancroft Should Thus Be Affirmed.

A. The act of inducing a breach of contract in order to constitute a tort for which damages can be recovered, must be an intentional one, and if the actor did not intend to induce a breach, he cannot be held liable, although an actual breach results from his actions.

26 A. L. R. 2d 1227, 1246;

Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P. 2d 631;

Dickinson v. Samples, 104 Cal. App. 2d 311, 231 P. 2d 530.

1. An intention to induce a breach of contract is essential to the cause of action for inducing breach of contract.

26 A. L. R. 2d 1227, 1246;

Imperial Ice Co. v. Rossier, supra;

17 So. Cal. L. Rev. 74;

15 R. C. L. Interference (1929), 63, Sec. 24.

2. The Court below and Jury clearly found that there was no intention on the part of Appellee Bancroft to induce a breach of contract. [R. 136, 112.]

3. Bancroft did not intend to induce a breach of the WAA Form 65 Agreement by School District since he acted in good faith, in releasing possession of subject airplane to Finns, upon the belief that Finns had obtained clearance from the United States

for the sale and transfer of such plane from School District to Finns, and also said release of possession was only for the purpose of doing work thereon which could not be done at the school.

B. Whether or not it is held that Bancroft intended to induce breach of the WAA Form 65 Agreement, Bancroft was, nevertheless, privileged to induce such a breach.

1. Inducing of breach of contract is privileged and justified where the defendant seeks to perform a duty which he owes to a third person.

Caverno v. Fellows, 300 Mass. 331, 15 N. E. 2d 483;

Braden v. Perkins, 174 Misc. 885, 22 N. Y. S. 2d 144.

2. An agent is privileged to induce his principal to breach a contract. An agent or employee should be permitted to act for the economic interest of his principal or employer without having a threat of liability hanging over his head if he happens to interfere with the contract. The principal may choose to violate an agreement, and while he will be liable on the contract, no tort liability is incurred. The same freedom of choice should be given to the agent to be exercised within the scope of this authority.

Caverno v. Fellows, supra;

Greyhound Corp. v. Commercial Casualty Ins. Co., 259 App. Div. 317, 19 N. Y. S. 2d 239.

3. Any agency relationship furnishes an aboslute privilege to the agent to induce a breach of contract by his principal.

a. *Imperial Ice Co. v. Rossier, supra,* referring to *Boyson v. Thorn,* 98 Cal. 578, 33 Pac. 492, states:

"It is clear that the confidential relationship which existed between the manager of the hotel and the owner justified the manager in advising the owner to violate his contract with the plaintiffs. His conduct thus being justified, it was lawful, despite the existence of ill will or malice on his part."

b. *Hopper v. Lennen & Mitchell,* 52 Fed. Supp. 319, affirmed on this point (C. C. A. 9th) 146 F. 2d 364, 161 A. L. R. 282, held that there could be no recovery for allegedly inducing breach of contract where the action was justified by the presence of a confidential relationship between the party sued and the party influenced, who had an economic interest to protect.

C. Assuming that it be held that the School District was induced to breach of the WAA Form 65 Agreement, Bancroft is, nevertheless, not liable for damages, since Bancroft was not the proximate cause of said breach.

1. The inducing cause for the breach of said agreement, assuming there is held to be such a breach, was the solicitation by Finns of School District that said School District sell and transfer subject airplane to Finns.

a. In order to establish actionable interference with a contract, it must be shown that by reason of the defendant's wrongful act a contract which otherwise would have been performed was abandoned, that is, that there was a breach and that the defendant was the moving cause thereof.

Hill v. Progress Co., 79 Cal. App. 2d 771, 180 P. 2d 956;

Dickenson v. Samples, supra;

26 A. L. R. 2d 1227, 1249.

VI.

Assuming the Government Is Entitled to Judgment Against Vineland or Bancroft in This Action, the Only Proper Remedy Would Be That of Injunction or at Most Nominal Damages.

A. Assuming this Court finds that the Government has no right of possession in the subject aircraft but is entitled to judgment against the District or Bancroft, what would be the measure of damages to the Government for its actual loss on February 28, 1951 [Execution of Agreement, Vineland's Ex. B, R. 59], or April 14, 1951 (execution of Bill of Sale by Peter A. Bancroft), or July 26, 1951 (temporary transfer of physical possession to Finns)? The Government, in the trial of this action, being at a loss to show any reasonable measure of damages, has attempted to pursuade the Court to fix damages on the basis of a fixed standard of market value and to determine therefrom the interest on said amount for the loss of use of said aircraft or other testimony concerning the rental value of said plane. This method of determining damages in the instant case is clearly contrary to the law for the following reasons:

1. The purposes of damages is to place the plaintiff in as good a position as if the defendant had kept the contract.

Williston on Contracts, Sec. 1338;

Restatement of Contracts, Sec. 328;

Hetzel v. Baltimore Railroad, 169 U. S. 26.

2. "In damages for breach of contract, it is performance that the injured party is entitled to and it is not the contract of which he has been wrongfully deprived by the breach but the performance of the contract."

Hollwedel v. Duffy-Mott Company, 264 N. Y. Supp. 745;

Williston on Contracts, Sec. 1339.

(a) Thus, the damages in the instant case shall be those that would naturally flow from the performance of the contract and that were in the contemplation of the parties (not mere speculation).

Here, what LENGTH OF TIME could the Government contemplate the School District would use the subject aircraft for education purposes in performing the subject WAA Form 65 Agreement [Pltf. Ex. 1]?

(1) NONE WHATEVER. Said agreement allows the School District to scrap the aircraft at *any time* after it shall have been rendered completely unfit and useless, except for its basic material content. (After the three year period, prior approval of the Government was not even necessary. Here the plane was held four years. The fact that prior approval was not necessary after the three year period would mean the District could make its *own determination* as to *rendering the aircraft unfit and useless* except for its basic material content. The word *"rendered"* would appear to indicate the District so rendering the plane unfit and useless had complete and total control and power to determine this action, even of determination as to continued educational use though it may have had such or other uses at the

time. In other words, the complete power of reduction to basic material content was in the District. Thus, here the benefits which the Government could reasonably contemplate could not exceed the value of the aircraft for continued educational use or reduced to basic material content, whichever is lower. These are the miximum duties for which the Government could demand *performance* from the District under the most favorable interpretation for the Government of the Form 65 agreement as executed.

(2) THREE YEARS. If we read the appropriate Regulation No. 4 (May 21, 1946) into said Agreement, after the three year period there would not be any demand which the Government under the contract could make against the School District. The Regulation, by placing the three year period in said Agreement, indicates also that the maximum *educational use* which the Government reasonably contemplated was said three years, and after said three year period, the Government thus did not contemplate any further educational use or benefits to the Government therefrom. Thus no damages have or could accrue after the expiration of said three year period.

Any restrictions on free alienation for a period over three years would be invalid as in violation of the objectives of the Surplus Property Act of 1944. (*Supra,* I, B, pp. 12-25.)

(b) Where damages are *purely speculative,* and there is no reasonable measure thereof, only *nominal* damages can be given. You may not fix the certainty of said damages by arbitrarily using the mar-

ket value of the subject property. Here, the Government, in an attempt to find some means of fixing the damages, which it could reasonably contemplate from the performance of the subject WAA Form 65 Agreement, has grasped at the market value of the subject aircraft. This is entirely unreasonable.

(1) In the particular instance, however, the Government *does* have a measure of damages (if anything other than injunction is available) and has so determined them in the terms of its Agreement, WAA Form 65. These damages are the one duty wherein they had a right to enforce performance upon the School District (excluding for the purposes of this argument the contrary requirements of the statute or Regulation 4); *i.e.*, to enforce the scrapping of the subject aircraft and its reduction to its basic material content. Even here, however, it appears that the School District would be allowed to keep any proceeds received therefor, there being nothing in the agreement indicating to the contrary. Therefore, the only remedy of the Government would appear to be injunctive. This they have failed to request.

Even if the value of the material content is the appropriate damage value, evidence of such was not presented to the Court in this action, no valid evidence in connection therewith appears in the record. Any determination of such value would be purely *speculative*. (The Government's expert witness admitted no knowledge of the value of the aircraft in suit reduced to its basic material content. [R. 299.])

Assuming the flight restrictions are valid and do not expire in 3 years it may be argued that the Gov-

ernment should be protected against such use, *i.e.*, use by a foreign enemy, commercial use, speculative use, etc. Clearly again the remedy of the Government is injunction, not damages. In the instant case the plane is not, and never has been, in use by a foreign power, it is not, and never has been, used for commercial purposes; nor have the Finns or International Airports, Inc., nor any other person or organization made a profit or in any way benefited from any purported breach.

B. Assuming the Government is entitled to immediate possession of the aircraft in suit, since the Government obtains possession of the plane in suit, damages for the *loss* of the plane by the Government are not available. What damages, if any, are available to the Government for the loss of use (or other loss) of this plane in suit?

Once again the Government in an attempt to find a fixed standard upon which to base damages has grasped at fair market value of the plane in suit and based its loss upon rental value of the plane or interest on said fair market value. (The evidence shows that there was no rental value on the plane in suit in 1946 when it was transferred to the District. [Government's witness Duly, R. 292, 299.])

The Government can only expect to recover for whatever use it could enforce at the time the occurrence of the forfeiture or reverter. The Government cannot obtain damages for its loss for any greater use or performance than was contemplated by the parties as indicated in the executed WAA Form 65. (Same reasons as set forth in the above Paragraph VI, A, *supra,* pp. 56-60.) Such use, adopting the most favorable interpretation for

the Government, in the present action *re* WAA 65, was use by the District for educational purposes or basic material content, whichever was lower. There could be no rental value for an aircraft reduced to its basic material content. Thus, the loss to the Government would again be nominal or non-existent for the same reasons as set forth above in Paragraph VI, A. (*Supra,* pp. 56-60.)

The decision of the District Court should thus be affirmed in its dismissal of the action as against the Vineland School District and Bancroft if for no other reason than that the Government's action against said parties is moot or at most *de minimus.*

Conclusion.

It is respectfully submitted that the judgment below dismissing the Government's complaint as against appellees Vineland School District and Peter A. Bancroft should be affirmed, but that any portion of said Court's judgment, findings or conclusion which holds, finds or concludes or implies that any party other than Vineland School District has any right, title or interest in or right to possession of the aircraft in suit should be reversed.

Respectfully submitted,

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